(G-68)

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1019

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS.

BRIEF FOR APPELLEES

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INDEX.

CITATIONS.

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BRIEF FOR APPELLEES

This Court noted probable jurisdiction on March 22, 1976, ... U.S. ...., 47 L.Ed.2d 730, on an appeal by appellants of a decision by the Court of Appeals of the State of New York. The unanimous decision and opinion appear in the Jurisdictional Statement, at pp. 31 *et seq.*

Reported at 37 N Y 2d 535 (1975).

Question Presented

Whether plaintiffs' out-of-state stock exchanges, not subject to the New York Stock Transfer Tax, are remotely and unconstitutionally discriminated against under the Commerce Clause of the Constitution of the United States (Art. 1, § 8, cl. 3), when such transfer tax, classified for such purpose, has no extra-territorial tax application and (a) is imposed only upon certain stock sales made within the State by non-residents at tax rates lower than those imposed upon like sales made by residents (New York Tax Law, § 270-a(1)), and (b) a reduced but maximum tax is imposed upon statutorily defined large block sales of stock made within the State, whether made by residents or non-residents (*ibid.*, § 270-a(2)), when such tax statute was enacted to protect and preserve the State's securities industry, the State's economy, and the public revenue.

The precise question presented, therefore, is certainly not, as incorrectly posed by appellants, whether the statute subjects "transactions involving out-of-state sales to heavier taxation than identical transactions involving in-state sales?" (Brief, p. 2), in fact, no transfer tax whatever is imposed on out-of-state sales but is imposed only *if* stock is later transferred *within* the State by the local transfer agent or by the corporation whose stock is to be transferred, a purely local incident at the end of the stream of commerce having a sufficient local nexus to justify the transfer tax.[1]

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[1] Appellants have abandoned all other constitutional objections to § 270-a raised in their complaint (Jurisdictional Appendix, pp. 7-9), at various stages of this action, *viz.:* the Privileges and Immunities Clause of Article 4, § 2 (upon appeal the Court of Appeals, 37 N Y 2d 535, 538; Jurisdictional Statement, p. 9), and the Equal Protection Clause of the Fourteenth Amendment in this Court (Jurisdictional Statement, p. 3; Brief, p. 5).

Of course, if appellants prevail, then the taxable status quo is restored to where it was before the enactment of Tax Law, § 270-a, *supra*, by virtue of the New York Laws of 1968, ch. 827. Section 11 thereof requires the reimposition of the higher rates of taxation imposed by Tax Law, § 270, without distinction between the sales by non-residents or large block sales or transfers within the State. Ch. 827, *supra*, § 10 also provides for the separability of § 270-a in the event of the unconstitutionality of any of its subdivisions so that the others remain viable as enacted.

Sections 10 and 11 of ch. 827 are reproduced as Appendix A hereto.

Statute Involved and Administrative Implementation

1. The Statute

The New York Transfer Tax (Tax Law, § 270-a) under attack was enacted by the Laws of 1968, ch. 827 and is reproduced in part in the Jurisdictional Statement of the Appellants, pp. 14-21 with its legislative history appearing at pp. 22-30.

Section 4 of ch. 827 enacted § 270-a, and subdivision 1 thereof provides for reduced stock transfer taxes to non-residents for sales made in New York State whereas subdivision 2 provides for a reduced but maximum tax imposed upon certain so-called large block sales of stock made in New York State, whether made by residents or non-residents. Both subdivisions were sustained by the New York Court of Appeals as constitutional.

The reason for the enactment of § 270-a is expressed in the legislative findings reflecting the public policy of the State, as follows:

"Section 1. Legislative findings. The legislature hereby finds that: The securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are nonresidents of the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable."

2. Legislative History:

Chapter 827, *supra,* including its legislative findings, was the result of two years of negotiation between the New York Stock Exchange, the City of New York, legislative leaders and the State administration (25-26)[2] to induce this Exchange to remain in the City of New York, "and to making New York the financial center of the world", to bolster the securities industry, to preserve and protect the economy, and the public revenue, and to meet the competition from out-of-state exchanges (23-30). The statement of the New York Stock Exchange with respect to the

[2] Page references are to the Jurisdictional Statement.

necessity for the enactment of chapter 827 and the financial contribution by the securities industry to the economy of the City and State of New York appears at pages 25-30.

As to the need for the reduced tax imposed by section 270-a(1), *supra,* on sales made by non-residents the Exchange reported (51):

"Non-Resident Individuals

"Customers of the New York securities markets who live and work outside the State pay some 80% of the transfer tax. Some non-residents can and do avoid paying the tax by transacting their securities business outside New York on the regional stock exchanges. The brokerage commission charged by these exchanges is the same as in New York. However, none of the cities or states where the regional exchanges are located imposes a stock transfer tax."

As to the need for special provisions pertaining to the sales of large blocks of stock (§ 270-a(2), *supra*), the Exchange also reported (27-28):

"Large Transactions

"There is also an incentive to avoid the stock transfer tax on large orders. Transactions of 10,000 or more shares on the regional exchanges have increased by 202% in 1965-67.

"Proposal for Tax Reform

"As a result of these studies, the proposal for tax reform has two basic objectives:

"1) Retain the revenue from the tax.

"2) Minimize the competitive problems for New York securities markets created by the existing law and provide a sound base for future increased tax revenues.

"Over a five-year period, the proposed tax reform would:

"1) Provide for a 50% reduction from the existing tax rates for non-resident individuals.

"2) Set a tax ceiling of $350 per transaction. On a stock selling for $20 or more the maximum shares taxed would be 7000.

"No special tax relief is provided for Exchange members or securities broker-dealers.

"In essence, the purpose of the bill is to reduce the incentives to avoid the tax by doing business outside the New York markets.

* * *"

Executive approval of chapter 827 was accompanied by the Governor's memorandum of approval which expresses the legislative findings, intent and purpose of the enactment, in part as, follows (23-24):

"*On approving L.1968, c.827, which continues the present stock transfer tax rates until July 1, 1969, the Governor stated:*

June 16, 1968

"* * *

"Since the stock transfer tax was enacted in 1905, there have been far reaching changes in the securities industry, but the stock transfer tax has not been revised to keep pace with those changes. The securities industry has grown from an essentially New York industry to one of national and international scope. While the bulk of stock transfers still funnels through New York, only twelve percent of the Nation's investors are located in the State. At the same time, competition for the New York markets has been heightened by the rise of regional stock exchanges located outside the State where more than 90 percent of trading is in securities listed on the New York

Stock Exchange. The development of modern telecommunications and electronic computer systems has, of course, greatly expanded the capacity of the regional exchanges to challenge the New York exchanges for business.

"The bill recognizes the changing character of the securities industry and the importance of its continued presence and strength for the future economic prosperity of the State and will provide long-term relief from some of the competitive pressures from outside the State.

"As a result of adoption of the revisions of the stock transfer tax contained in this bill, the New York Stock Exchange has announced that it intends to remain and expand in New York and is not studying sites for a new exchange building in downtown Manhattan. The Exchange's action augurs well for the future growth of New York as the Nation's financial center and acknowledges the confidence of the industry in the ability of city government and the legislature to recognize the industry's problems and to commit themselves to a long-term course for the benefit of all.

"The bill is approved.

Nelson A. Rockefeller"

3. Administrative Implementation

Detailed administrative regulations have been promulgated with respect to the construction and application of the Stock Transfer Tax, including those under section 270-a, *supra.* They appear in *New York Codes, Rules and Regulations,* vol. 20, Taxation and Finance, §§ 440.1 *et seq.* In addition to these regulations, counsel to the Tax Department rendered an opinion, dated September 1, 1970 (see e.g. *C.C.H. New York Tax Service,* vol. 2, ¶ 57-401a), which sets forth more precise examples than do appellants (Brief, pp. 7-8) concerning the imposition of the tax upon sales by non-residents and large block sales. This opinion appears as Appendix B hereto.

In addition to this, we must point out the inaccuracy of appellants' statement in their Brief, p. 4:

"Thus a person transferring or delivering securities in New York pursuant to an out-of-state sale now pays a higher tax in many circumstances than one transferring or delivering the same securities pursuant to an in-state sale."

Since the addition of section 28(d) to the Securities Exchange Act of 1934, as amended in 1975 by P.L. 94-29 (89 Stat. 97, 161, § 28(d); 15 U.S.C. § 78bb(d), this no longer holds true. This statement is now moot and is no longer involved, on and after December 1, 1975, the effective date for the application of section 28(d), as a result of an opinion rendered by Counsel to the New York State Department of Taxation and Finance, dated December 1, 1975 (*C.C.H. New York Tax Reports, No. 525*, p. 3; *C.C.H. New York Tax Service*, vol. 2, ¶ 57-101.605). This is appended hereto as Appendix C, and states, in part:

"* * *

Section 21 of the new Federal law adds a new section 28(d) to the Securities Exchange Act of 1934. This act provides, in part, as follows:

'(d) No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision . . .'

"The Stock Transfer Tax Regulations provide that a transfer of record ownership on the books of a corporation within the State is subject to the stock transfer tax (20 NYCRR 440.2). However, in view of the Federal law, where the sole event in New York State is the delivery or transfer to or by a 'registered clearing agency' or a 'registered transfer agent', as those terms are defined under the Securities Exchange Act of 1934, there is no stock transfer tax due and owing on and after December 1, 1975. However, where a sale, agreement to sell, memorandum of sale or any other delivery or transfer takes place in New York State, the stock transfer tax due and owing thereon must be paid.

* * *"

Thus, appellants' examples of the "Operation of the 'Maximum Tax'" and "Operation of 'Non-Resident Discount'" (Brief, pp. 7-8,) must be construed in the light of this opinion.[3]

[3] Appellants graphs illustrative of these examples are also *incorrect* (Brief, pp. 9-10) and require correction and clarification. The footnote pertaining to the graph "Operation of Maximum Tax" is incorrect. A correct footnote should read instead: "The solid line between $0 and $350 in this graph represents the tax paid by a resident and non-resident selling in New York State." The balance of the footnote through the word "circumstance" would be more appropriate instead as a footnote to the graph on p. 10 at the Brief "Operation of Non-Resident Discount" with the following changes added thereto: "The tax paid by a non-resident selling in New York would be exactly 50% of the amount shown by the dotted line. The 'maximum tax' in that circumstance would not serve as a ceiling until more than 14,000 shares were involved as shown above."

Moreover, since appellants, in passing, make only "footnote" reference to P.L. 94-29, §§ 11A(a) (1) (c) (ii) and 28(d) (Brief, pp. 4, 19), the significance of this entire legislation to the issue involved is overlooked and incomplete. This will be shown under the Argument hereafter.

ARGUMENT

The reduced tax rates imposed by the Stock Transfer Tax upon sales in New York are purely upon local transactions at the end of commerce which neither burden nor discriminate against interstate commerce within the meaning of the Interstate Commerce Clause.

A. Introduction.

The sole question involved is whether the State of New York has the constitutional power under the Tenth Amendment and pursuant to its taxing powers to enact legislation (L. 1968, ch. 827) in order to protect its economic interests, its public revenue, a major industry, and the economic welfare of its citizens dependent thereon. This is clearly demonstrated by the legislative history of ch. 827, above discussed, and which is effectuated by providing tax inducements in lower tax rates for the sale of "large blocks" of stock and for sales by non-residents to both when sales transactions occur within the State.[4] The legislative objectives on a domestic level are no different from those national objectives which Congress recognize with the enactment of P.L. 94-29 (89 Stat. 97; 15 U.S.C. §§ 78 *et seq.).*

[4] These benefits are no different from those afforded by Article 16, § 3 of the New York Constitution which prohibits an income tax upon income of non-residents and foreign corporations, unless carrying on a

(Footnote continued on following page)

Thus, P.L. 94 provides (89 Stat. 111, § 7):

"Sec. 11A(a) (1) The Congress finds that—

"(A) The securities markets are an important national asset which must be preserved and strengthened.

* * *"

This came after the *Senate Report* No. 94-75 stated (p. 3; *U.S. Code Congressional and Administrative News,* Vol. 1, 94th Cong. 1st Sess., 1975, pp. 181-187):

"The securities markets of the United States are indispensable to the growth and health of this country's and the world's economy. In order to raise the enormous sums of investment capital that will be needed in the years ahead and to assure that that capital is properly allocated among competing uses, these markets must continue to operate fairly and efficiently. In the Committee's view, the increasing tempo and magnitude of the changes that are occurring in our domestic and international economy make it clear that the securities markets are due to be tested as never before. Unless these markets adapt and respond to the demands placed upon them, there is a danger that America will lose ground as an inter-

(Footnote continued from preceding page)

business, if they merely kept their "money and securities" in New York. Its purpose was to attract and retain investments from such sources free from tax which had always been the State's policy since the enactment of the Personal Income Tax in 1919 (ch. 627), first by administrative construction, later by statute since 1933, and finally, by Constitutional mandate in 1938 (see, *e.g.*, 1939 *Annual Report of the State Tax Commission*, 1940 *Leg. Doc.*, No. 11, pp. 9-10, 29-30). Its purpose, as with L. 1968, ch. 827, was: "Thus enormous amounts of such intangible personalty from all over the United States will be attracted to this State, making for the conservation of the financial center of the country here." (1938 *Constitutional Journal and Documents*, No. 2, p. 3, see also, pp. 413-415, *ibid.*, and 1938 Constitution Revised Record, Vol. III, pp. 1113-1119, 2470-2472; *Matter of Goodwin v. State Tax Commission*, 286 App. Div. 694 [1955], affd. 1 N Y 2d 680, app. dsmd. 352 U.S. 805).

national financial center and that the economic, financial and commercial interests of the Nation will suffer.

The rapid attainment of a national market system as envisaged by this bill is important, therefore, not simply to provide greater investor protection and bolster sagging investor confidence but also to assure that the country maintains a strong, effective and efficient capital raising and capital allocating system in the years ahead.

The basic goals of the Exchange Act remain salutary and unchallenged: to provide fair and honest mechanisms for the pricing of securities, to assure that dealing in securities is fair and without undue preferences or advantages among investors, to ensure that securities can be purchased and sold at economically efficient transaction costs, and to provide, to the maximum degree practicable, markets that are open and orderly. S. 249 is an important step in assuring that the securities markets and the regulations of the securities industry remain strong and capable of fostering these fundamental goals under changing economic and technological conditions."

The House Conference Report No. 94-229 reported in the same vein at p. 9 of its report *(op. cite.*, p. 322).

At the same time, a statutory provision was also added to provide for greater competition within the securities industry (P.L. 94-29, §§11 A(b) and (c)(1). The reasons therefor were reported in Senate Report No. 94-75, pp. 12-14; *op. cite.*, pp. 190-193. While this recognition is true, as appellants note (Brief, p. 19), nevertheless, they fail to disclose in their long footnote to §28(d) (Brief, p. 4) the reasons why Congress also added §28(d), (P.L. 94-29, 89 Stat. 161, 15 U.S.C. §78 bb [d]). Section 28(d) provides:

"(d) No State or political subdivision thereof shall impose any tax on any change in beneficial or

record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefore or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change is[1] beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision. No State or political subdivision thereof shall impose any tax on securities which are deposited in or retained by a registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor, unless such securities would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State of political subdivision."

It is clear, however, from the Congressional reports relating to this section that Congress did not intend to divest nor deprive the States of all existing or future power to impose a stock transfer tax upon local transactions at the end of interstate commerce. This was clearly recognized by its Congressional reports on its legislative intent despite the need for competition within the securities industry. Thus, it was also noted that a *prior* subcommittee report of 1972 had recommended: "4. Legislation be enacted prohibiting the imposition of state and local taxes in such a way as to inhibit unreasonably the development of an efficient *national clearing and depository system;* * * *." (Emphasis added, *op. cite.*, p. 232), nevertheless, this phraseology must be dis-

tinguished from a localized stock transfer tax imposed following a sale of stock, as the Senate Report on P.L. 94-29, *supra,* in fact noted later. This report is quite specific in expressing Congressional intent of non-interference with existing powers in the States pertaining to local stock transfer taxation by especially noting *(Senate Report No. 94-75,* p. 60; *U.S. Code Congressional and Administrative News, supra,* Vol. 1, 94th Cong., 1st Sess., 1975, p. 238):

D. STATE TAXES ON SECURITIES TRANSACTIONS

"During its previous hearings on paperwork processing legislation, the Committee received evidence that the imposition of state transfer taxes may be impeding the development of a national system of processing securities transactions. At the time of its hearings in October of 1971, for example, it appeared that the New York Stock Transfer Tax might apply to transactions, regardless of where or between whom executed, if delivery were made by means of bookkeeping entry in New York or by the movement of securities in or out of a New York depository or clearing house. Recent amendments to the New York Stock Transfer Tax may have eliminated this particular problem, but the evidence also revealed that other state and local authorities are considering the imposition of stock transfer taxes as one means of producing badly needed revenue. The Committee expresses no opinion regarding the wisdom of such taxes provided they are not applied in such a way as to impede the development of a national system of clearing and settling securities transactions. But, prohibition of state transfer taxes which do impede such development is clearly in the public interest.

Therefore, the bill prohibits the imposition of state taxes on securities or upon the transfer of securities merely because the facilities of a clearing agency are physically located in the taxing state (Section 28(a)).

This provision is designed to facilitate the development of a national system for handling securities transactions while at the same time preserving the state taxing powers over transactions with which the taxing state has a traditional jurisdictional basis for taxation."

and again thereafter in its "section by section analysis" of the legislation (*op. cite,* p. 139, *ibid.,* p. 316):

"Subsection (d) to Section 28 to prevent the application of State or local taxes on securities or on the transfer of securities solely because the facilities of a registered clearing agency (or nominee thereof) are physically located in the taxing jurisdiction. The section is designed to work the least possible interference with State law while at the same time facilitating the purposes of the bill. States with jurisdictional bases for taxation other than activities with respect to clearing agencies would not be affected."

B. No Constitutional Infirmity Exists Under the Interstate Commerce Clause.

Appellants' constitutional objections to the reduced tax rates afforded by Tax Law, §270-a upon sales in New York to both non-residents and to the sales of large block shares of stock, whether by residents or not, are devoid of merit. As noted below (37 N Y 2d 535, 540, Jurisdictional Statement, p. 34): "If section 270-a is invalidated, the prior tax scheme would again become effective L. 1968 ch. 827, §11) and the appellants would be restored to their position of economic superiority". However, the former tax scheme, of course, was sustained by this Court long ago against the very claim, as made here, that the stock transfer tax imposed an unconstitutional burden upon interstate commerce for transfers of stock made in New York *(Hatch* v. *Reardon,* 204 U. S. 152 [1906]; see also *O'Kane* v. *State of New York,* 283 N.Y. 439 [1940]; *cf. Freeman* v. *Hewitt,* 329 U.S. 249 [1946]).

The present tax is neither a burden upon nor a discrimination against interstate commerce within the meaning of the Commerce Clause. Quite the contrary, the reduced tax rates erect no barrier against the free flow of commerce, since they are intended and designed in *favor* of such commerce by encouraging the occurrence of stock transactions involving non-residents in the State of New York. The statute imposes no prohibition upon or restriction against the sales of stock upon any securities exchange and a seller of stock is free, at his option, to sell wherever the stock is listed. If sold outside New York, the transfer tax is imposed under Tax Law, § 270, *supra*, and at a higher rate *only* if "* * * the stock is transferred in New York by a local transfer agent or upon the corporate books", as noted below (37 N Y 2d 535, 539) (Jurisdictional Statement, p. 32). In such case, the taxable event is dependent upon the fortuitous circumstance of the location of the transfer agent or the corporate books within New York, even though no other State imposes a similar tax. If the stock is sold and transferred elsewhere, then no tax is or can be imposed by New York. Accordingly, the location of either the transfer agent or the corporate books within New York constitutes sufficient nexus to justify the local tax in return for the services, protection, and facilities afforded by the State and its subdivisions,[5] since, as noted below, "It is now well settled that

[5] After defraying administrative costs of the transfer tax, its entire revenue is payable into the special account for the Municipal Assistance Corporation for the City of New York for the repayment of the City's obligations to the Corporation and the surplus is paid into the general fund of the City of New York for the support of local government pursuant to State Finance Law, § 92-b (L. 1965, ch. 91, as amended by L. 1966, ch. 3, L. 1969, ch. 768 and L. 1975, ch. 768, § 7). This is in complete accord with the principle that "interstate commerce bear its proper share of the costs of local government in return for the benefits received." *(Mich-Wis. Pipeline Co.* v. *Calvert*, 374 U.S. 157, 166

(Footnote continued on following page)

the Commerce Clause does not prohibit the States from levying a tax on the transfer of property within the State *(Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, 348; cf. *Freeman* v. *Hewitt*, 329 U.S. 249, 258)." (37 NY 2d 535, 539, Jurisdictional Statement, pp. 32-33). After all, the transfer tax is imposed as the result of *local* incident at the *end* of interstate commerce and is not unlike a sales tax imposed on a transfer of property at the end of such commerce (see *e.g. McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 [1940]), or an ad valorem property tax at the end of foreign commerce (*Michelin Tire Corp.* v. *Wages, Tax Commissioner, et al.*, ... U.S. ......, 46 L. Ed. 2d. 495, decided January 14, 1976).

Accordingly, the New York Court of Appeals correctly disposed of appellants' constitutional objections under the Commerce Clause, as follows (37 N Y 2d 535-543, Jurisdictional Statement, pp. 37-39):

> "Here, as indicated, the Legislature found that the tax as originally enacted had the reverse effect in that it conferred an economic advantage on exchanges located outside the State. The appellants do not dispute this. To neutralize this advantage, the Legislature enacted section 270-a and it seems clear that they had the power to do so. A use tax is a familiar example of this type of compensatory legislation and it is well settled that it does not offend the commerce clause (see, e.g., *Miller Bros. Co. v. Maryland*, 347 US 340, 343; cf. *Alaska v. Arctic Maid*, 366 US 199). Thus the stated legislative goal is a valid one.

(Footnote continued from preceding page)

(1954)). The added surcharge of 25%, referred to by appellants (Brief, p. 4), imposed by L. 1975 ch. 395 was merely one of a series of laws enacted for the benefit of the City of New York to meet its "severe fiscal crisis" (ch's. 394-396).

Although helpful, this is not necessarily controlling for the determinative question in each case is 'whether the statute under attack *** will in its practical operation work discrimination against interstate commerce' *(Best & Co. v. Maxwell,* 311 US 454, 456, *supra).*

The statute should have no practical effect whatsoever on sales by shareholders, both residents and non-residents, involving stocks which do not have to be transferred in New York. If they sell on a New York exchange, of course they can claim the benefit of section 270-a. But if they sell on one of the appellants' exchanges, they would pay no tax at all. Here the stock transfer law still works to the appellants' economic advantage.

The sale of New York securities poses a different problem. Then the transfer tax must be paid and the amount due depends on whether the sale is made in New York or elsewhere. In the case of New York residents it is more than likely (cf. *Nippert v. Richmond,* 327 US 416) that the sale would be made on a New York exchange in any event, so that section 270-a should have little or no 'practical' effect on such transactions.

The appellants' major argument then is that section 270-a discriminates against interstate commerce by encouraging nonresidents to sell New York securities on New York exchanges. This assumes that such sales would be intrastate so that the practical effect of the statute would be to 'discriminate against interstate commerce in favor of intrastate commerce' *(O'Kane,* 283 NY 439, 446, *supra).*

The sale of intangibles is, of course, commerce within the meaning of the commerce clause *(Freeman v. Hewit,* 329 US 249). And we can assume that sales of New York stocks by a nonresident on an out-of-State exchange would nevertheless involve interstate commerce because the securities must ultimately be trans-

ferred in New York (but see *Hatch v. Reardon,* 204 US 152, *supra).* But we cannot assume, as the appellants do, that if the non-resident chooses to make the sale in New York—in order to claim the exemption provided by the statute—the transaction would lose its interstate character.

Typical of this latter type of transaction is one in which a resident of one of the areas in which the appellants operate gives his New York broker, or a New York correspondent of a local broker, an order to sell. When, in such a case, the New York broker executes the order, the customer will normally send his stock certificate to the New York broker to fulfill his agreement to sell. Such a sale is not an intrastate transaction. On the contrary in *Freeman v. Hewit* (329 US 249, 259, *supra*) the Supreme Court considered an identical transaction and concluded 'Of course this is an interstate sale'. In other words the trouble with the appellants' argument is that a sale by a nonresident on a New York exchange—the type of transaction the law allegedly encourages—is still interstate commerce. Nor are we persuaded by appellants' argument that the decision in *Halliburton Oil Well Co. v. Reily* (373 US 64, *supra*) compels a different result since in that case this precise point was neither argued nor decided."

C. Inapplicability of Appellants' Citations.

In their previous Jurisdictional Statement to this Court, appellants conceded that New York had the "authority to tax the transfer, delivery and sale of securities which occur in-state" (Statement, p. 14), and they state in their Brief from (p. 3) "New York's constitutional authority to impose a transfer tax was upheld by this Court in 1907, *Hatch* v. *Reardon,* 204 U.S. 152 (1907)". Nonetheless, for economic superiority they seek a restoration of the former but higher tax rates which would be imposed, if they prevail, upon the very same kind of in-state transactions,

since they contend their own local *business* has been adversely affected by New York's present lower tax rates, not that the commerce into and in New York at the end of interstate commerce has been burdened by New York's tax inducements.

The sole question is the constitutionality of the tax as applied in New York to transactions occurring there and nowhere else. After all, New York is not required to permanently retain its tax structure as originally enacted when, as here, such structure requires modification to meet changing economic conditions of the market place within its own constitutional sphere of authority, as the legislative history of Tax Law, § 270-a, *supra,* clearly demonstrates. As a matter of fact, the Court of Appeals rejected appellants' argument for a return to "economic superiority" under present circumstances, as noted above (35 NY 2d 535, 540) (Jurisdictional Statement, p. 37). As this Court has stated: "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." (*Seagram and Son* v. *Hostetter,* 384 U. S. 35, 43, citing cases [1965], rearg. den., *ibid.,* 967). In other words, when a State acts constitutionally within its borders for its own economic interests, "Certainly this Court will not interpose its own economic views or guesses when the State has made its choice." (*Safeway Stores* v. *Oklahoma Grocers,* 360 U. S. 334, 341 [1958]; see also *Mich.-Wis. Pipeline Co.* v. *Calvert,* 347 U. S. 157, 166 *supra*). This is precisely the situation here.

The fundamental weakness of appellants' specious contentions stems from the failure to heed the warnings of this Court pertaining to the guidelines for constitutional interpretation, by the citation of irrelevant cases, a mis-

reading thereof, and by generalized extractions therefrom wholly out of context and which upon analysis upon their facts and law have absolutely no application to the precise issue here, *viz.:*

> "We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations excluding the concrete circumstances which they profess to summarize." (*Wisconsin* v. *J. C. Penny Co.,* 311 U. S. 435, 445 [1940]).

and stated somewhat differently:

> "Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as a product of preoccupation with their special facts." (*Freeman* v. *Hewitt, supra,* 329 U. S. 249, 252 [1946], rehrg. den. 329 U.S. 832).

These guidelines have been consistently followed by this Court (see, *e.g., Michelin Tire Corp.* v. *Wages, Tax Commissioner, et al., supra,* .... U. S. ...., 46 L.Ed. 2d 495, [Jan. 1976]) and by the Court below (see, *e.g., Shapiro* v. *City of New York,* 32 N Y 2d 96, 108 [1973], app. dsm. for want of a substantial federal question, 414 U. S. 804, rehrg. den. at p. 1087), and, indeed, in this very case when the Court of Appeals concluded:

> "Nor are we persuaded by appellants' argument that the decision in *Halliburton Oil Well Co.* v. *Reily* (373 U. S. 64, *supra*) compels a different result, since in that case this precise point was neither argued nor decided." (37 N Y 2d 535, 543, Jurisdictional Statement, p. 39).

It is for these reasons that appellants' citations are irrelevant and inapplicable here. The opinions in *Freeman* v. *Hewitt, supra,* 329 U. S. 249 (1946), clearly isolates and

disposes of, as inapplicable to the circumstances here, the earlier cases of *Welton* v. *Missouri*, 91 U. S. 275 (1875); *Guy* v. *Baltimore*, 100 U. S. 434 (1879); *Robbins* v. *Shelby Taxing District*, 120 U. S. 489 (1886); *Best & Co. v. Maxwell*, 311 U. S. 454 (1940), and *Nippert* v. *Richmond*, 327 U. S. 416 (1945). All five cases, of course, were concerned solely with *license* fees or a *privilege* tax required or imposed in order to engage in commerce, clearly violative of the Commerce Clause under their circumstances. The reliance upon the later case of *Halliburton Oil Well Co.* v. *Reily, supra*, 373 U. S. 64, is similarly misplaced, as noted above, because that case, too, is not in point. There the state tax was found to be a discrimination against a competitive taxpayer and, therefore, against interstate commerce because it treated the foreign taxpayer therein differently and unfairly from the domestic taxpayer in the imposition of the sales and use taxes upon like equipment and with tax exemptions to the domestic taxpayer which were denied to the out-of-state taxpayer.

Similarly inapplicable are the cases of *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U. S. 389 (1952), and *Miller Brothers Co.* v. *Maryland*, 347 U.S. 340 (1954), since in the former a privilege tax upon an out-of-state vendor for soliciting orders was held void, and in the latter, a use tax upon the mere possession of goods in transit was held void upon an out-of-state vendor who was not within the taxing jurisdiction.

Even more remote to the present issue are appellants' citations dealing with the State's various regulatory efforts over the milk industry and its prices involved in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U. S. 511 (1935); *H. P. Hood & Sons* v. *DuMond*, 336 U. S. 525 (1949); *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951); and *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361 (1964); or the

regulation of the packaging of in-state farm products destined for interstate shipment in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), or the regulation of the interstate shipment of shrimp or oysters in *Foster-Fountain Packaging Co.* v. *Haydel*, 278 U. S. 1 (1928) and in *Johnson* v. *Haydel*, 278 U. S. 16 (1928), respectively.

In the milk cases, *supra*, denial of licenses to out-of-state producers were held to be unconstitutional as unjustifiable discrimination against interstate commerce in the cases of *H.P. Hood & Sons* and *Dean Milk*; in the *Polar Ice Cream* case, a state statute and regulations requiring a milk distributor to purchase its milk supply from area producers at a fixed price and to take all milk offered were held unconstitutional under the commerce clause, since they interferred with the distributor's purchases from out-of-state producers. In the *Foster Fountain* and *Johnson* cases, *supra*, state statutes which sought to regulate the shipment of shrimp and oysters were held invalid, since these products by those taking them were immediately entitled to be shipped in interstate commerce. Clearly these are not the circumstances here, and the statute involved makes no attempt to frustrate interstate commerce nor impose any unconstitutional burden on such commerce.

CONCLUSION

The order and judgment of the New York Court of Appeals should be affirmed, in all respects, and Tax Law, § 270-a be declared constitutional under the commerce clause.

Dated: June 7, 1976

Respectfully submitted,

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APPENDIX A

Laws of 1968, ch. 827:

"§ 10. If any section of this act, or the repeal, amendment, or change made by any such section to any item, clause, sentence, sub-paragraph, paragraph, subdivision, section or other part of article twelve of the tax law, or the application thereof to any person or circumstances, shall be held to be invalid, such holding shall not affect, impair or invalidate the remainder of this act or any other item, clause, sentence, subparagraph, paragraph, subdivision, section or other part of article twelve of the tax law repealed, amended or changed by this act, or the application of such section of this act or such section or part of a section of such article twelve of the tax law held invalid, to any other person or circumstances, but shall be confined in its operation to the section of this act or the item, clause, sentence, subparagraph, paragraph, subdivision, section or other part of article twelve of the tax law repealed, amended or changed by this act, directly involved in such holding, or to the person and circumstances therein involved.

§ 11. In the event that section four of this act or subdivision one or two of section two hundred seventy-a of the tax law as added thereto by such section four, shall be held to be invalid by reason of unconstitutionality, whether federal or state, then in either of such events, in the case of such subdivision one, the rates of tax provided by section two hundred seventy of the tax law, as amended by this act, shall be deemed to have applied and shall apply to resident individuals and nonresident individuals alike, and in the case of such subdivision two, the rates of tax provided for by section two hundred seventy of the

tax law as amended by this act shall be deemed to have applied and shall apply to all transactions subject to the tax imposed by article twelve of the tax law, without any limitations as to the maximum amounts of tax due on any such transactions.

§ 12. If any provision of this act or of the sections of the tax law amended by this act, is inconsistent with, in conflict with, or contrary to any other provision of law, such provision of this act or section of such tax law shall prevail over such other provision and such other provision shall be deemed to have been amended, superseded or repealed to the extent of such inconsistency, conflict or contrariety.

APPENDIX B

Opinion of Counsel of the New York State Department of Taxation and Finance

"STATE OF NEW YORK

DEPARTMENT OF TAXATION AND FINANCE

September 1, 1970

"Best, Counsel.—Chapter 827 of the Laws of 1968 amended the stock transfer tax imposed by Article 12 of the Tax Law by adding to it a new section 270-a to make two basic changes in the stock transfer tax. First, it provides a lower rate of tax on sales made in New York State by a nonresident, and, second, it provides a maximum limit on the amount of tax on

any single sale made in the State by either a resident or a nonresident. In each of these instances, the basic requirement is that the sale of the stocks must be made in the State of New York.

"Where a sale of stocks by a nonresident is made outside of the State of New York, any agreement to sell, any memorandum or contract to sell, any delivery, and any record of transfer on the books of the corporation or its transfer agent made in the State of New York subjects the transaction to the stock transfer tax at the rates prescribed in subdivision 2 of section 270 of the Tax Law.

"Following are two examples of illustrative situations:

"(1) X, a nonresident of the State of New York (as defined in paragraph (b) of subdivision 1 of section 270-a), sells shares of stocks through his broker on a securities exchange located outside of the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stock to the name of the purchaser. The record transfer of the shares made by the transfer agent in New York State is subject to the rate of tax prescribed by subdivision 2 of section 270 of the Tax Law, rather than the lower tax prescribed by paragraph (a) of subdivision 1 of section 270-a as the sale was not made in the State of New York.

"(2) X, a nonresident of the State of New York, sells shares of stocks through his broker on a

securities exchange located in the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stocks to the name of the purchaser. The sale of the stocks having been made in the State of New York by a nonresident the lower rate of tax prescribed by section 270-a is applicable.

With respect to the maximum limit on the amount of tax on a single sale (as defined in subdivision 2 of section 270-a), the maximum limit applies only if the sale is made in the State of New York.

"Following are two examples of illustrative situations:

"(3) X orders his broker to sell 100,000 shares of stock of the same class of Y Corporation. The broker either on the same day or on a later day makes a sale of these shares to a single purchaser on a securities exchange located outside the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stocks to the name of the purchaser. As the sale of the stock was made on a securities exchange located outside the State of New York, the sale of these shares was made outside the State of New York, and the transfer to be made by the transfer agent in the State of New York is subject to the rate of tax prescribed by subdivision 2 of section 270 of the Tax Law.

"(4) X orders his broker to sell 500,000 shares of stock of the same class of Y Corporation. The

broker, who is a member of a securities exchange located in the State of New York on the same day or on a later day sells on such exchange 250,000 shares to one purchaser, and 250,000 shares to another purchaser. Both sales are made on the same day. As both sales in this example fall within the definition of a single taxable, sale, as defined in subdivision 2 of section 270-a, and as both sales were made on a securities exchange located in the State of New York, the sales were made in the State of New York, and the maximum limit on the amount of tax as prescribed in subdivision 2 of section 270-a applies.

"The maximum limit on the amount of tax on a single taxable sale applies to a sale made within the State of New York by either a resident or nonresident.

"The sole purpose of this opinion is to emphasize that the provisions of section 270-a of the Tax Law are applicable only where the sale of stocks is made in the State of New York. It is not intended to be an opinion of Counsel as to the definition of a single taxable sale."

APPENDIX C

Opinion of Counsel of the New York State Department of Taxation and Finance

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
DECEMBER 1, 1975

Peter Crotty, Counsel.—Inquiries have been received regarding the application of the Securities Acts Amendments of 1975, Public Law 94-29, to the administration of the New York stock transfer tax.

Section 21 of the new Federal law adds a new section 28(d) to the Securities Exchange Act of 1934. This act provides, in part, as follows:

> "(d) No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision . . ."

The Stock Transfer Tax Regulations provide that a transfer of record ownership on the books of a corporation within the State is subject to the stock transfer tax (20 NYCRR 440.2). However, in view of the Federal law, where the sole event in New York State is the delivery or transfer to or by a "registered clearing agency" or a "registered transfer agent", as those terms are defined under the Securities Exchange Act of 1934, there is no stock transfer tax due and owing on and after December 1, 1975. However, where a sale, agreement to sell, memorandum of sale or any other delivery or transfer takes place in New York State, the stock transfer tax due and owing thereon must be paid.

Transfer agents may accept a certification in the following form when certificates of stock are presented for transfer in New York and the sole event in the State is the delivery or transfer by a registered transfer agent:

> "It is hereby certified that the delivery and transfer of the attached certificate is not subject to the New York stock transfer tax under section 28(d) of the Securities Exchange Act of 1934 and no transaction subject to tax has occurred."

....

(Firm name)

....

(Authorized Signature and title)

Appendix C—Opinion of Counsel of New York State Department of Taxation and Finance.

As to parties who are not qualified to use the form of exemption certification under section 593.3(a) of the Regulations on the New York City Tax on Sale and Purchase of Certificates of Indebtedness, the words "New York City bond transfer tax" may be substituted for or added to the words "New York stock transfer tax" in the above certification.